United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

TRANSCRIPT OF RECORD.

Court of Appeals, District of Columbia

OCTOBER TERM, 1910.

742

No. 2174.

WASHINGTON TERMINAL COMPANY, APPELLANT,

vs.

DISTRICT OF COLUMBIA.

AND

No. 2175.

DISTRICT OF COLUMBIA, APPELLANT,

vs.

WASHINGTON TERMINAL COMPANY.

APPEALS FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED MAY 21, 1910.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

OCTOBER TERM, 1910.

No. 2174.

WASHINGTON TERMINAL COMPANY, APPELLANT,

vs.

DISTRICT OF COLUMBIA, APPELLEE.

AND

No. 2175.

DISTRICT OF COLUMBIA, APPELLANT,

vs.

WASHINGTON TERMINAL COMPANY, APPELLEE.

APPEAL AND CROSS-APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 23, 1910.

In the Court of Appeals of the District of Columbia.

No. 2174.

WASHINGTON TERMINAL COMPANY, Appellant,
vs.
DISTRICT OF COLUMBIA.

and

No. 2175.

DISTRICT OF COLUMBIA, Appellant,
vs.
WASHINGTON TERMINAL COMPANY.

---

a Supreme Court of the District of Columbia.

At Law. No. 51181.

THE DISTRICT OF COLUMBIA
v.
THE WASHINGTON TERMINAL COMPANY.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above entitled cause, to wit:

1 *Stipulation as to Pleadings.*

Filed February 24, 1910.

In the Supreme Court of the District of Columbia.

At Law. No. 51181.

THE DISTRICT OF COLUMBIA
v.
THE WASHINGTON TERMINAL COMPANY.

It is hereby agreed by the parties to the above entitled case, through their respective counsel, that the plaintiff may file a new

declaration herein to contain a count under the Act of March 3, 1883, set out in the original declaration, a count under the Act of March 26, 1908, set out in the original declaration, and the common counts, said amended declaration to stand in the place of the original declaration filed herein; that for the purpose of permitting a demurrer to the first two counts of the said amended declaration, the common counts shall be withdrawn, to be restored in the event the case shall go to a trial upon the issues of fact; that the defendant shall file a demurrer to the said two counts, and an order shall be entered, pursuant to the opinion of the court filed herein, sustaining the demurrer to the first count of the said amended declaration and overruling it as to the second, and judgment shall be entered accordingly; that the parties hereto may then prosecute appeals as they may be advised.

E. H. THOMAS,
F. H. S.,
Att'y for Pl'tiff,
GEORGE E. HAMILTON,
Att'y for Defendant.

2 Ordered, by the Court, that the parties hereto have leave to plead as above agreed.

____ ____,
Chief Justice.

Amended Declaration, &c.

Filed February 24, 1910.

* * * * * * *

The plaintiff, with leave of the Court first had and obtained, hereby amends its declaration, heretofore filed herein, so as to read as follows:

1. The plaintiff, the District of Columbia, a municipal corporation, sues the defendant, the Washington Terminal Company, a corporation doing business in the District of Columbia, in an action of debt, for money payable by the defendant to the plaintiff for that the said defendant at the times mentioned in the bill of particulars attached hereto and made a part hereof, was required by, and it became and was the duty of the said defendant under the Act of Congress approved March 3, 1883 (22 Statutes at Large, 466) which provides: "That hereafter all railroad companies using engines propelled by steam shall pay to the District for the lighting of the streets, avenues, alleys and grounds through which their tracks may be laid, under the direction and control of the Commissioners; and in case of default of payment of such bills,
3 actions at law may be maintained by the District of Columbia against said railroad companies therefor", to pay to the District of Columbia for the lighting of all streets, avenues, alleys and grounds through which the tracks of the defendant are laid, the said defendant being a railroad company using engines propelled by

steam, within the meaning of the said Act of 1883, as such streets, avenues, alleys and grounds might be lighted under the control of the said Commissioners of the Plaintiff; and whereas the said Commissioners have caused to be lighted certain of the aforesaid streets, avenues, alleys and grounds, to wit:

10 electric arc lamps on 2d street from H to M streets, N. E.
1 " " " " H " at west entrance to subway
13 25 candle power incandescent electric lamps in Florida avenue subway
13 25 candle power incandescent electric lamps in M street subway
17 25 candle power incandescent electric lamps in L street subway
29 25 candle power incandescent electric lamps in K street subway
108 25 candle power incandescent electric lamps in K street subway,

through which streets tracks of the said defendant are laid, and for such lighting the plaintiff became liable and for which it has paid the sums set out in the said bill of particulars; and the said defendant under the terms of the aforesaid Act, became and is indebted to the said plaintiff in the said sum for the lighting of the said streets, avenues, alleys and grounds for the months of January to August, both inclusive, 1908, in to wit, the sum of $1,983.38, as in the said bill of particulars set forth; but the said defendant, wholly neglecting and disregarding its duty in the premises, under the said statute, has refused to pay for the lighting of the said streets, avenues, alleys and grounds, or any part thereof, although often *required* so to do, whereby a cause of action has accrued to the plaintiff against the defendant for the said sum of money. Wherefore the plaintiff claims the sum of $1,983.38, with interest at six per cent. on each of the monthly bills for lighting, as set forth in the bill of particulars, from the end of the respective months wherein the same accrued and became payable, besides costs of this suit.

2. The plaintiff sues the defendant for other money payable by the defendant to the plaintiff for that the said defendant, at the times mentioned in the bill of particulars attached hereto and made a part hereof, was required by and it became and was the duty of said defendant under the Act of Congress approved March 26, 1908, which provides:

"That hereafter the Washington Terminal Company, its successors, or transferees shall pay to the District for the lighting of the streets, avenues, alleys and grounds over and under which its right of way may cross, as well as for the lighting of those streets, avenues, alleys and grounds bordering on its right of way, under the direction and control of the Commissioners; and in case of default of payment of such bills, actions at law may be maintained by the District of Columbia against such terminal company or its successors or transferees therefor,"

to pay to the District of Columbia for the lighting of all streets, avenues, alleys and grounds over and under which the defendant's right of way crosses and on which its said right of way borders, as such

streets, avenues, alleys and grounds might be lighted under the control of the said Commissioners of the plaintiff; and whereas the said Commissioners have caused to be lighted certain of the aforesaid streets, avenues, alleys and grounds, to wit:

10 electric arc lamps on 2d street from H to M street, N. E.
1 electric arc lamp on H street at west entrance to subway
13 25 candle power incandescent electric lamps in Florida avenue subway
12 25 candle power incandescent electric lamps in M street subway
17 25 candle power incandescent electric lamps in L street subway
29 25 candle power incandescent electric lamps in K street subway.
108 25 candle power incandescent electric lamps in H street subway,

over and under which defendant's right of way crosses, and on which its right of way borders, and for such lights the plaintiff became liable and has paid the sum of $1042.04, and the said defendant, under the terms of the aforesaid Act, became and is indebted to the said plaintiff in the said sum for the lighting of the said streets, avenues, alleys and grounds for the months of June to August, both inclusive, 1908, to wit, in the sum of $1,042.04 as in the said
6 bill of particulars set forth; but the said defendant, wholly neglecting and disregarding its duty in the premises, under the said statute, has refused to pay for the lighting of the said streets, avenues, alleys, and grounds, or any part thereof, although often requested so to do, whereby a cause of action has accrued to the plaintiff against the defendant for the said sums of money. Wherefore the plaintiff claims the sum of $1,042.04 with interest at six per cent. on each of the monthly bills for lighting as set forth in the bill of particulars from the end of the respective months wherein the same accrued and became payable, besides costs of this suit.

3. The plaintiff sues the defendant for other money payable by the defendant to the plaintiff for work done and materials provided by the plaintiff for the defendant at its request; for money lent by the plaintiff to the defendant; for money paid by the plaintiff for the defendant at its request; for money received by the defendant for the use of the plaintiff; and for money found to be due from the defendant to the plaintiff on account stated between them. And the sum of $3.025.42 with interest at six per cent. on each of the monthly bills for lighting as set forth in the said bill of particulars, from the end of the respective months wherein the same accrued and became payable, besides costs of this suit.

EDWARD H. THOMAS,
F. H. S.,
Corporation Counsel, for Plaintiff.

7 *Bill of Particulars.*

FEBRUARY 1, 1908.

The Washington Terminal Company to District of Columbia, Dr.

1908.

For maintenance of public lamps on those streets avenues, alleys and grounds through which the tracks of the Washington Terminal Company are laid during the month of January, 1908, viz:	
11 electric arc lamps from January 1st to 31st, incl. at the rate of $85.00 per lamp per annum 31/366.....	$79.19
180 25 candle-power electric incandescent lamps from January 1st to 31st incl. at the rate of $20.00 per lamp per annum 31/366.....	304.92
	$384.11

Payable at the office of the Collector of Taxes, D. C. within thirty (30) days from date to the credit of appropriation Electric Department, D. C., 1908.

Electric Lighting.....	$79.19

Of appropriation Electric Department, D. C. 1908.

Street Lighting.....	304.92

I certify that the above account is correct.

(Signed) WALTER C. ALLEN,
Electrical Engineer, D. C.

FEBRUARY 29, 1908.

The Washington Terminal Company to District of Columbia, Dr.

1908.

For maintenance of public lamps on those streets, avenues, alleys and grounds through which the tracks of the Washington Terminal Company are laid in the District of Columbia, during the month of February, 1908, viz:	
11 electric arc lamps from February 1st to 29 incl.	
8 at the rate of $85.00 per lamp per annum 29/366.	$74.08
180 25 candle-power electric incandescent lamps from February 1st to 29th, inclusive, at the rate of $20.00 per lamp per annum 29/366.....	285.25
	$359.33

Payable at the office of the Collector of Taxes, D. C. within thirty (30) days from date to the credit of appropriation Electric Department, D. C. 1908.

Electric Lighting..... $74.08

Of appropriation Electric Department, D. C. 1908.

Street Lighting..... 285.25

I certify that the above account is correct.
(Signed) WALTER C. ALLEN,
Electrical Engineer, D. C.

MARCH 31, 1908.

The Washington Terminal Company to District of Columbia, Dr.

1908.

For maintenance of public lamps on those streets avenues, alleys and grounds through which the tracks of the Washington Terminal Company are laid in the District of Columbia, during the month of March 1908, viz:

11 electric arc lamps from March 1st to 31st incl. at the rate of $85.00 per lamp per annum 31/366..... $79.19

180 25 candle-power electric incandescent lamps from March 1st to 31st incl. at the rate of $20.00 per lamp per annum 31/366..... 304.92

$384.11

Payable at the office of the Collector of Taxes, D. C. within thirty (30) days from date to the credit of appropriation Electric Department, D. C. 1908.

Electric Arc Lighting..... $79.19

Of appropriation Electric Department, D. C. 1908.

Street Lighting..... 304.92

I certify that the above account is correct.
(Signed) WALTER C. ALLEN,
Electrical Engineer, D. C.

9 MAY 1, 1908.

The Washington Terminal Company to District of Columbia, Dr.

1908.

For maintenance of public lamps, on those streets, avenues alleys, and grounds through which the tracks of the Washington Terminal Company are laid in the District of Columbia, during the month of April, 1908, viz:

30/366 ..... $76.64

11 electric arc lamps from April 1st to 30th incl. at the rate of $85.00 per lamp per annum 30/366..... 295.08

$371.72

Payable at the office of the Collector of Taxes, D. C., within thirty (30) days from date to the credit of appropriation Electric Department D. C. 1908.

Electric arc lighting..... $76.64

Of appropriation Electric Department, D. C. 1908.

Street lighting..... 295.08

I certify that the above account is correct.

(Signed) H. C. EDDY,
Acting Electrical Engineer, D. C.

JUNE 1, 1908.

The Washington Terminal Company to District of Columbia, Dr.

1908.

For maintenance of public lamps on those streets, avenues, alleys and grounds through which the tracks of the Washington Terminal Company are laid in the District of Columbia, during the month of May, 1908, viz:

11 electric arc lamps from May 1st to 31st incl. at the rate of $85.00 per lamp per annum 31/366..... $79.19

180 25 candle-power electric incandescent lamps from May 1st to 31st incl. at the rate of $20.00 per lamp per annum 31/366 ..... 304.92

$384.11

Payable at the office of the Collector of Taxes, D. C., within thirty (30) days from date to the credit of appropriation Electric
10 Department, D. C., 1908.

Electric Arc Lighting..... $79.19

Of appropriation Electrical Department, D. C., 1908.

Street Lighting 304.92

I certify that *that* the above account is correct.

(Signed) WALTER C. ALLEN,
Electrical Engineer, D. C.

JULY 1, 1908.

The Washington Terminal Company to District of Columbia, Dr.

1908.

For maintenance of public lamps, on those streets, avenues, alleys and grounds through which the tracks of the Washington Terminal Company are laid and under and over which its right of way crosses or on which its right of way borders in the District of Columbia, during the month of June, 1908, in accordance with the Act of Congress approved May 26, 1908 (Public No. 139) viz:

11 Electric arc lamps from June 1st to 30th incl. at the rate of $85.00 per lamp per annum 30/366.....	$76.64
180 25 candle power electric incandescent lamps from June 1st to 30th incl. at the rate of $20.00 per lamp per annum 30/366	295.08
	$371.72

Payable at the office of the Collector of Taxes, D. C., within thirty (30) days from date to the credit of appropriation Electrical Department, D. C., 1908.

Electrical arc lighting.....$76.64

Of appropriation Electrical Department, D. C., 1908.

Street Lighting..... 298.08

I certify that the above account is correct.

(Signed) WALTER C. ALLEN,
Electrical Engineer, D. C.

11

JULY 31, 1908.

The Washington Terminal Company to District of Columbia, Dr.

1908.

For maintenance of public lamps on those streets avenues, alleys and grounds through which the tracks of the Washington Terminal Company are laid and under and over which its right of way crosses or on which its right of way borders, in the District of Columbia, during the month of July 1908, in accordance with the Act of Congress approved May 26, 1908 (Public No. 139) viz:

11 electric arc lamps from July 1st to 31st incl. at the rate of $85.00 per lamp per annum 31/365.....	$79.41
180 25 candle power electric incandescent lamps from July 1st to 31st incl. at the rate of $20.00 per lamp per annum 31.365.....	305.75
	$385.16

Payable at the office of the Collector of Taxes, D. C. within thirty (30) days from date to the credit of appropriation Electric Department, D. C. 1909.

Electric Arc Lighting..... $79.41

Of appropriation Electrical Department, D. C. 1909.

Street Lighting..... 305.75

I certify that the above account is correct.
(Signed) WALTER C. ALLEN,
Electrical Engineer, D. C.

AUGUST 21, 1908.

The Washington Terminal Company to District of Columbia, Dr.

1908.

For maintenance of public lamps on those streets, avenues, alleys and grounds through which the tracks of the Washington Terminal Company are laid and under and over which its right of way crosses or on which its right of way borders in the District of Columbia, during the month of August 1908, in accordance with the Act of Congress approved May 26, 1908 (Public No. 139) viz:

12 11 electric arc lamps from August 1st to 31st, inclusive, at the rate of $85.00 per lamp per annum 31/365 ..... $79.41

180 25 candle-power electric incandescent lamps from August 1st to 31st, inclusive, at the rate of $20.00 per lamp per annum 31/365..... 305.75

$385.16

Payable at the office of the Collector of Taxes, D. C. within thirty (30) days from date to the credit of appropriation Electrical Department, D. C. 1909.

Electric Arc Lighting..... $79.41

Of appropriation Electrical Department, D. C. 1909.

Street Lighting 305.75

I certify that the above account is correct.
(Signed) WALTER C. ALLEN,
Electrical Engineer, D. C.

* * * * * * *

DISTRICT OF COLUMBIA, *ss:*

Walter C. Allen, being first duly sworn, says that he is the Electrical Engineer, one of the officers of the District of Columbia, and has supervision of the lighting of such streets, avenues, alleys and grounds as are under the control of the District of Columbia; that by direction of the Commissioners of the District of Columbia ten electric arc lamps were erected on Second street, northeast, and one on H street, northeast, as set out in the declaration to which this affidavit is attached, which declaration is made a part hereof, the light for which was, and is now furnished by the Potomac Electric
13 Power Company at the rate of $85.00 per lamp per annum during the months of January to August, 1908, both inclusive, i. e. the sum of $623.75, which sum the District of Columbia has paid to the said Electric Company; that the said District of Columbia also furnished 180 twenty-five candle-power electric incandescent lamps as follows: 13 in Florida Avenue subway, 13 in M street subway, 17 in L street subway, 29 in K street subway and 108 in H street subway, all northeast, the light for which was, and is now, furnished by the said Electric Company during the said months at the rate of $20.00 per lamp per year, for which the said District has paid the said Electric Company the sum of $2401.67; the said streets are streets through which the tracks of the said Washington Terminal Company are laid, or which are under or over or border on the right of way of the said Terminal Company; that under the Acts of Congress of March 3, 1883, and May 26, 1908 set out in the said declaration, the Washington Terminal Company became liable to the District of Columbia in the said sums of money amounting together to $3,025.42; that affiant has repeatedly sent bills to the said Terminal Company for the said sums for lighting said streets, but the said Terminal Company has positively refused to pay the same; affiant says the said Washington Terminal Company is justly indebted to the District of Columbia in the sum of $3,025.42, with interest at the rate of six per cent per annum on the said monthly bills from the end of the respective months in which the same accrued, exclusive of all set-offs and just grounds of defense.

WALTER C. ALLEN.

14 Subscribed and sworn to before me this 23d day of February A. D. 1910.

RALPH BALDWIN PRATT,
Notary Public, D. C.

Supreme Court of the District of Columbia.

THURSDAY, *February 24th,* 1910.

Session resumed pursuant to adjournment, Hon. Harry M. Clabaugh, Chief Justice, presiding.

* * * * * * *

On motion of plaintiff by its attorney and pursuant to stipulation of the parties hereto filed herein February 24th, 1910, by their re-

spective attorneys of record, leave is hereby granted to said parties to plead herein as in said stipulation agreed within twenty days hereof.

Demurrer to 1st and 2nd Counts of Amended Declaration.

Filed March 15, 1910.

* * * * * * *

Now comes the defendant, The Washington Terminal Company, and demurs to the first and second counts of the amended declaration filed in the above-entitled cause, and says that the said counts, and each of them, are bad in substance.

HAMILTON, COLBERT, YERKES & HAMILTON,
Attorneys for Defendant.

15 NOTE.—Among other matters of law to be argued in support of this demurrer are the following:

1st. That the sections and provisions of the act of Congress of March 3, 1883, set out and relied upon in the first count of said amended declaration, are unconstitutional.

2nd. That the sections and provisions of the act of Congress of May 26, 1908, referred to and relied upon in the second count of said amended declaration, are unconstitutional.

3rd. That the act of Congress of May 26, 1908, referred to and relied upon in the second count of said amended declaration, did not become effective and law until and including the first day of July, 1908.

4th. That the defendant, the Washington Terminal Company, under the acts of Congress of February 12, 1901, and February 23, 1903, and which acts provide for its creation and incorporation, the construction and location of its buildings, right-of-way, tracks, &c., and the occupation and maintenance of its right of way and its tracks, is not granted the right to lay any of its tracks through any of the streets, avenues, alleys or grounds of the District, the use of which is retained for and to the public; that under said legislation the said defendant's right-of-way and tracks thereon, must be constructed either over or under all streets, avenues, alleys and grounds in the District of Columbia which remain and continue subject to public use.

5th. That under said acts of Congress of February 12,
16 1901, and February 23, 1903, providing for the creation, incorporation, construction and location of the buildings, right-of-way, and tracks of the defendant, the Washington Terminal Company, and the occupation, operation and maintenance of said right-of-way and said tracks, the said Terminal Company is not a Railroad Company within the meaning of the act of Congress of March 3, 1883, or subject to the provisions of said act.

Supreme Court of the District of Columbia.

FRIDAY, *March 18th,* 1910.

Session resumed pursuant to adjournment, Hon. Harry M. Clabaugh, Chief Justice presiding.

* * * * * * *

Upon considering the demurrer of defendant to the first and second counts of the amended declaration, and in compliance with the stipulation of counsel, it is considered that said demurrer be and the same is hereby sustained as to the first count thereof and overruled as to the second count thereof; whereupon, the parties hereto, by their said attorneys, electing to stand upon the pleadings, it is considered that the plaintiff take nothing by said first count of the declaration and that the defendant go thereof without day: Further, it is considered that, as to the second count of said declaration, the plaintiff recover against the defendant the sum of One thou-
17 sand and forty-two dollars and four cents ($1042.04), with interest on $371.72 from June 30, 1908; on $385.16 from July 31, 1908, and on $385.16 from August 31, 1908, at 6% per annum until paid, being the money payable by it to the plaintiff, by reason of the premises, together with its costs of suit to be taxed by the Clerk, and have execution thereof.

MONDAY, *April 4th,* 1910.

Session resumed pursuant to adjournment, Hon. Harry M. Clabaugh, Chief Justice, presiding.

* * * * * * *

Comes now defendant by its attorney and in open court notes an appeal from the judgment, entered herein March 18th 1910, whereupon the penalty of a bond to operate as a Supersedeas, is hereby fixed in the sum of Two Thousand Dollars, ($2000.00) or for costs in the sum of One Hundred ($100.00) Dollars.

Order for Citation.

Filed April 4, 1910.

* * * * * * *

The Clerk of said Court will please issue citation on the appeal noted and taken in the above entitled cause.

HAMILTON, COLBERT, YERKES & HAMILTON,
Attorneys for Def't.

18 Filed Apr. 5, 1910. J. R. Young, Clerk.

In the Supreme Court of the District of Columbia.

At Law. No. 51181.

DISTRICT OF COLUMBIA
vs.
WASHINGTON TERMINAL COMPANY.

The President of the United States to District of Columbia, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein, under and as directed by the Rules of said Court, pursuant to an Appeal entered in the Supreme Court of the District of Columbia, on the 4th day of April, 1910, wherein Washington Terminal Company is Appellant, and you are Appellee, to show cause, if any there be, why the Judgment rendered against the said Appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Harry M. Clabaugh, Chief Justice of the Supreme Court of the District of Columbia, this fourth day of April in the year of our Lord one thousand nine hundred and ten.

[Seal Supreme Court of the District of Columbia.]

J. R. YOUNG, *Clerk,*
By H. BINGHAM,
Ass't Clerk.

Service of the above Citation accepted this 4 day of April, 1910.
E. H. THOMAS,
F. H. S.,
Attorney for Appellee.

[Endorsed:] 7. No. 51181. Law. District of Columbia vs. Wash. Terminal Co. Citation. Issued Apr. 4, 1910. Served cop- of the within Citation on —— ——. —— ——, Marshal. Hamilton, Colbert, Yerkes & Hamilton, Attorneys for Appellant. Filed Apr. 5, 1910. J. R. Young, Clerk.

19 *Order for Appeal and Citation.*

Filed April 5, 1910.

* * * * * * *

The Clerk of said Court will please enter an appeal on behalf of the plaintiff to the Court of Appeals, & issue citation to the appellee, the Washington Terminal Co., on cross appeal.

E. H. THOMAS,
F. H. S.,
Attorney for District of Columbia.

20 In the Supreme Court of the District of Columbia.

At Law. No. 51181.

Filed Apr. 5, 1910. J. R. Young, Clerk.

DISTRICT OF COLUMBIA
vs.
WASHINGTON TERMINAL COMPANY.

The President of the United States to Washington Terminal Company, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein, under and as directed by the Rules of said Court, pursuant to an Appeal entered in the Supreme Court of the District of Columbia, on the 5th day of April, 1910, wherein the District of Columbia is Appellant, and you are Appellee, to show cause, if any there be, why the Judgment rendered against the said Appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Harry M. Clabaugh, Chief Justice of the Supreme Court of the District of Columbia, this fifth day of April in the year of our Lord one thousand nine hundred and ten.

[Seal Supreme Court of the District of Columbia.]

J. R. YOUNG, *Clerk,*
By ALF. G. BUHRMAN, *Ass't Cl'k.*

Service of the above Citation accepted this 5th day of April, 1910.

HAMILTON, COLBERT, YERKES & HAMILTON,
Attorney- for Appellee.

[Endorsed:] 9. No. 51181 Law. Dist. of Col'a vs. Washington Terminal Company. Citation. Issued Apr. 5, 1910. Filed Apr. 5, 1910. J. R. Young, Clerk. E. H. Thomas, Attorney for Appellant.

21 *Memorandum.*

April 5, 1910.—Appeal bond of Washington Terminal Co. approved and filed.

Directions to Clerk for Preparation of Transcript of Record.

Filed April 7, 1910.

* * * * * * *

The Clerk will please include in the record on appeal the following:

1910.
Feb. 24. Stipulation as to pleadings.
Amended declaration filed.
Leave to plead in twenty days.
Mar. 15. Demurrer of defendant.
18. Demurrer to first count of declaration sustained and judgment for defendant on first count; demurrer to second count overruled and judgment for plaintiff for $1042.04, with costs and interest.
Apl. 4. Appeal by defendant noted.
Citation.
5. Appeal by D. C. noted.
Citation.
Bond of defendant filed.

HAMILTON, COLBERT, YERKES & HAMILTON,
Attorneys for Defendant.

22 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 21, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 51,181 at Law, wherein The District of Columbia is Plaintiff and The Washington Terminal Company is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 20th day of May, 1910.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 2174. Washington Terminal Company, appellant, vs. District of Columbia. And No. 2175. District of Columbia, appellant, vs. Washington Terminal Company. Court of Appeals, District of Columbia. Filed May 20, 1910. Henry W. Hodges, clerk.

IN THE

Court of Appeals, District of Columbia

OCTOBER TERM, 1910

No. 2174.

WASHINGTON TERMINAL COMPANY, a Corporation,
Appellant,

vs.

DISTRICT OF COLUMBIA, *Appellee,*

AND

No. 2175.

DISTRICT OF COLUMBIA, *Appellant,*

vs.

WASHINGTON TERMINAL COMPANY, a Corporation,
Appellee.

APPEALS FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BRIEF ON BEHALF OF WASHINGTON TERMINAL COMPANY, A CORPORATION, APPELLANT IN NO. 2174, AND APPELLEE IN NO. 2175.

GEORGE E. HAMILTON,
JOHN W. YERKES,
Attorneys for Washington Terminal Company.

M. J. COLBERT,
JOHN J. HAMILTON,
Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Court of Appeals, District of Columbia

OCTOBER TERM, 1910.

No. 2174.

WASHINGTON TERMINAL COMPANY, a Corporation,
Appellant,

vs.

DISTRICT OF COLUMBIA, *Appellee,*

AND

No. 2175.

DISTRICT OF COLUMBIA, *Appellant,*

vs.

WASHINGTON TERMINAL COMPANY, a Corporation,
Appellee.

APPEALS FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BRIEF ON BEHALF OF WASHINGTON TERMINAL COMPANY, A CORPORATION, APPELLANT IN NO. 2174, AND APPELLEE IN NO. 2175.

STATEMENT.

The District of Columbia (appellee in No. 2174, and appellant in No. 2175, and hereinafter styled the District)

brought action in the Supreme Court of this District against the Washington Terminal Company (appellant in No. 2174, and appellee in No. 2175, and hereinafter styled the company) for the recovery of $3,025.42, being moneys paid by the District for lighting from January 1 to September 1, 1908, portions of certain streets on which the Terminal area bordered, or over which certain tracks of the company were carried by viaducts or overhead bridges.

The amended declaration as it stands before this Court, consists of two counts: In the first count recovery is sought of $1,983.38, being the cost of lighting for the months of January to May, 1908, both inclusive (by error August, instead of May, appears in the declaration, Rec. p. 3). In the second count recovery is sought of $1,042.04, the cost of lighting the same streets for the months of June to August, 1908, both inclusive.

The right of recovery of the first sum is based on a provision in the Act of Congress approved March 3, 1883 (22 Statutes at Large, p. 466), being "An act making appropriations to provide for the expenses of the Government of the District of Columbia for the fiscal year ending June 30, 1884, and for other purposes," and being in the following words:

> "That hereafter all railroad companies using engines propelled by steam, shall pay to the District for the lighting of the streets, avenues, alleys and grounds through which their tracks may be laid, under the direction and control of the Commissioners; and in case of default in payment of such bills, actions at law may be maintained by the District of Columbia against said railroad companies therefor." (Rec. p. 3.)

Recovery in the second count is based on a provision in a similar Act of Congress approved May 26, 1908 (35 Statutes at Large, 274, at p. 287), in words as follows:

> "That hereafter the Washington Terminal Company, its successors or transferees, shall pay to the District for the lighting of the streets, avenues, alleys and grounds over and under which its right of way may cross, as well as for the lighting of those streets. avenues, alleys and grounds bordering on its right of way, under the operation and control of the Commissioners; and in case of default in payment of such bills, actions at law may be maintained by the District of Columbia against such Terminal Company or its successors or transferees therefor." (Rec. p. 3.)

The defendant company filed its demurrer to both counts (Rec., p. 11) for the reasons—

1st. That the sections of the Acts of Congress above quoted are unconstitutional so far as the Terminal Company is concerned.

2nd. That the Act of Congress of May 26, 1908, relied upon in the second count of the amended declaration, did not become effective and law until and including the first day of July, 1908. That the defendant, the Terminal Company, under the Acts of Congress creating it and clothing it with certain powers, did not grant it the right to lay any of its tracks through any of the streets, avenues, or grounds of the District, but that under said legislation the company was required to construct its tracks, either over or under said streets, avenues, alleys and grounds.

3rd. That the defendant company is not a railroad company within the meaning of the Act of Congress of March 3, 1883, or subject to the provisions of said act.

The court below, upon consideration, sustained the demurrer to the first count, holding that the Act of Congress of March 3, 1883, applied clearly to railway conditions existing in the District at the time of its passage, and could not be invoked against the defendant company, whose physical conditions and operations were entirely different from

those existing at the former date. Judgment being for the defendant company on this count, the District, standing upon its pleading, appealed.

The demurrer to the second count was overruled, and judgment entered against the company, from which judgment it appealed.

ASSIGNMENT OF ERRORS.

The court below erred:

1st. In overruling defendant company's demurrer to the second count of plaintiff's amended declaration.

2nd. In holding that the plaintiff, the District, was entitled to recover against the company for either the months of June, July, and August under the second count.

ARGUMENT.

FIRST POINT.

THE ACT OF 1883 ON WHICH THE FIRST COUNT IN THE AMENDED DECLARATION IS BASED, APPLIED ALONE TO RAILROAD COMPANIES WHOSE TRACKS WERE LAID AT GRADE THROUGH STREETS IN THE DISTRICT OF COLUMBIA.

A.

When the Congress enacted the law of 1883, above cited, there were certain steam railroads in the District of Columbia whose tracks occupied, by legislative authority, a portion of the actual bed of the streets at crossings, and at other places. These roads were constructed through the streets, on streets used by the public and by the roads, with mutual rights and duties resting on the public and the railroads. The presence of these tracks brought some in-

creased inconvenience and danger to the traveling public, and therefore the Congress, perhaps legally, required the companies to place lights at or along these tracks so that the public using the streets conjointly with the railroads would receive warning and additional protection.

We may grant that legislative power exists to require railroad companies using streets at grade to light their tracks, and while this also may incidentally light the entire width of the street, yet we insist this legislative power "extends no further than the enactment of a statute requiring *tracks* to be so lighted as to afford protection to the members of the community."

Ellliott on Railroads, Vol. II, p. 971.

The propriety for this protection to the public through the lighting of steam railway tracks laid at grade, in, through and across various streets of the District of Columbia, existed in 1883 when the law being considered was enacted. Then the citizen, whether on foot or in vehicle, was constantly crossing steam railway tracks, and was subjected to danger to himself and his property in so doing. But that condition did not exist in 1908 from January to May, inclusive, or for any moment of that time so far as an inch or foot of any track owned or operated by the Terminal Company is concerned.

This court will take judicial notice of the Acts of Congress approved February 12, 1901 (31 Stats., 774) and February 28, 1903 (32 Stats., 909), in conformity with the provisions of which the Terminal Company exists, constructed the Union Station and necessary tracks, and under which it maintains and operates them.

Under these laws the Terminal Company had no power or authority to lay a rail on any street, avenue, alley or any portion of the public grounds, but its tracks were required to be constructed and maintained either over or

under streets, alleys, avenues and public grounds of the District; and further, the law required all this great protective work to be done under plans agreed to by the Commissions of this District, and filed in the office of the Engineer Commissioner. The legal presumption is that this law has been obeyed, and there is no suggestion in the record to the contrary.

The history of this most important legislation is familiar to all. The Congress determined—

1st. That grade crossings should be abolished in the City of Washington, and this menace to life and limb be forever removed, and

2nd. That a Union Station, magnificent in its architecture and proportions, thoroughly in harmony in design, construction and appointments, with the superb federal buildings of this great Capital, should be constructed.

Congress gave the two railroads whose tracks entered the District and used the streets of this city by its permission, no option, but "required" the Philadelphia, Baltimore and Washington Railroad Company (commonly called the Pennsylvania) and the Baltimore and Ohio Railroad Company and the Washington Terminal Company, if incorporated, and whose funds were furnished in equal parts by the two railway companies above named, to carry through this great work of elevating tracks, constructing tunnels, building viaducts, erecting a superb railway station, and providing vast terminal freight and passenger yards. The only option the roads had was to obey or forfeit the right to enter with their tracks this city. They obeyed at a joint expenditure of over twenty millions of dollars.

The paramount purpose of Congress was to remove from this city grade crossings. This is apparent from reading the title to the acts of February 12, 1901, applying to the Pennsylvania and Baltimore and Ohio Roads, as follows:

> "An act to provide for eliminating certain grade crossings of railroads in the District of Columbia, to require and authorize the construction of new terminals and tracks for the Baltimore and Ohio Railroad Company in the City of Washington, and for other purposes."

The title of the second act is:

> "An act to provide for eliminating certain grade crossings on the line of the Baltimore and Potomac Railroad Company, in the City of Washington, District of Columbia, and requiring said company to depress and elevate its tracks, and to enable it to relocate parts of its railroad therein, and for other purposes."

In both acts the primary purpose of Congress was to eliminate grade crossings, and this purpose is clearly shown in the act of February 28, 1903, when the most specific directions are given as to the construction of girder bridges, masonry arches, viaducts and tunnels, and as a result of this Congressional action the residents of, and visitors to, the National Capital are now, and have been for the past three years, free from the perils which accompanied the use of streets through or across which great trains move at grade.

On page 4 of brief filed by counsel for the District, is the following statement:

> "By the act of 1903, the cost of the Union Station was fixed at $4,000,000. Under the acts of 1901 and 1903, $3,000,000 were paid to the B. & O. and the P., B. & W. Railroads, $1,500,000 to each."

One would naturally presume from reading this language that the Congress paid to the Railroad Companies $3,000,000 to be used in the construction of the building whose

minimum cost was fixed at $4,000,000. As a matter of fact the Acts of Congress clearly show that the $1,500,000 was given to each road for the purpose of assisting in meeting the enormous cost following the construction necessary to the abolition of grade crossings, and as compensation for certain rights and properties relinquished by the Railroad Companies. In the act of 1903, we find the following provision:

> "And in consideration thereof and of the relinquishment and surrender by said Philadelphia, Baltimore and Washington Railroad Company (commonly called the Pennsylvania) of its right to occupy and use the portion of the Mall, and to maintain thereon a new passenger station and terminals granted to the Baltimore and Potomac Railroad Company by the act aforesaid, in consideration of and as a contribution toward the large expenditures to be made by said company in the relocation and improvement of its line of railroad and *elimination of grade crossings* resulting therefrom, as required by said act, the sum of one million five hundred thousand dollars shall be paid to said Philadelphia, Baltimore and Washington Railroad Company, its successors and assigns, out of any moneys in the Treasury of the United States not otherwise appropriated."

Here there is no mention of a terminal station, but the appropriation is made for the express purpose of contributing toward the great expense following the elimination of grade crossings on the line of this road, through the building of viaducts and the construction of the tunnel under the Capitol grounds.

In the Act of February 12, 1901, is the following provision:

> "In consideration of the surrender by the Baltimore and Ohio Railroad Company, under the re-

quirements of this act, of its right under the several Acts of Congress heretofore passed, and under its several contracts with the municipal authorities of the City of Washington authorized by said Act of Congress, and in consideration of the large expenditures required for the construction of the new terminals, viaduct and connecting railroads, as required by this act, to avoid *all grade crossings* of *streets and avenues* within the City of Washington, and, further, in consideration of the grant and conveyance to the United States of the lands included within the limits of the roadway and right of way of the Washington Branch Railroad, which can be used for a street or avenue for the public benefit, the sum of one million five hundred thousand dollars, to be paid to said railroad company toward the cost of the construction of said *elevated terminals, viaduct, and structures* within the City of Washington, shall be, and is hereby appropriated, one-half to be paid out of any money in the Treasury of the United States not otherwise appropriated, the other half to be paid out of the revenues of the District of Columbia."

No argument can be made as to the moral propriety of compelling the Terminal Company to pay for lighting certain streets on the theory that the Union Station, constructed by the Terminal Company, was virtually a gift on the part of this nation and this city to the railroads occupying and using it.

B.

Notwithstanding the law of 1883 was enacted to meet distinct conditions then existing, namely, the passing of trains at grade through and on the streets of this city, yet counsel for the District insist in their brief that the above-named act also applies to a company which is not a railroad company and whose tracks and trains are above or

under the grade of the streets, and whose trains can and do bring no element of danger to those using the streets of the city.

If the Act of 1883 cover the Terminal Company, and is legal basis for the collection of these lighting bills of the District from January 1st, to May 1st, inclusive, 1908, why is it not legal warrant for enforcing payment of the bills for the remaining months included in the second count, and why was the provision in the District Appropriation Act of 1908, which is relied on in the second count, inserted?

The answer will be given in the exact language of the District itself, speaking before this suit was filed, through the then President of the Board of Commissioners of the District. The hearings held before the Senate Sub-committee on Appropriations, on the District Appropriation Bill for 1909, and which was approved May 26, 1908, were printed by order of the committee. These hearings were held in April, prior to the passage of the bill. The President of the Board of Commissioners, after referring to the fact that the Terminal Company did not consider itself responsible for the maintenance of the lamps and lights now under consideration, and after quoting the Act of 1883, said, at page 59:

> "We then left the matter to Corporation Counsel for such action as he might think proper, and he has been considering the matter; *but either we shall have to require the Washington Terminal Company expressly by law, by a provision in this act, to pay, or pay for the service ourselves.* I want to suggest a proviso as follows:"

And that proviso suggested was substantially the same as the clause incorporated in the act, and relied on in the second count.

Here, then, we have the distinct statement made by the

head of the District that unless the Act of 1908 expressly required the Washington Terminal Company to pay for this lighting, then the District itself would be compelled to bear the expense, as the Act of 1883 did not apply to the Terminal Company.

However, for fear this Court may not consider the legal opinion of the President of the Board of Commissioners a controlling precedent, we cite authority to support the prior-to-this-suit position of the District, which position evidently was that a law protecting citizens against the dangers following the operation of engines and trains through streets could not and did not apply to a situation where the trains were lifted high above the streets, or laid within a fixed area within which all streets were, by Act of Congress, absolutely closed, and therefore not within the purposes of the act.

In United States vs. Union Pacific Railroad Company, 91 U. S., p. 72, the court was considering certain provisions in the Act of Congress incorporating the Union Pacific Railroad Company and amendments thereto. At page 79 the court said:

> "In construing an Act of Congress, we are not at liberty to recur to the views of individual members in debate, nor to consider the motives which influence them to vote for or against its passage. The act itself speaks of the will of Congress, and this is to be ascertained from the language used. *But courts in construing a statute may, with propriety, recur to the history of the times when it was passed, and this is frequently necessary in order to ascertain the reason as well as the meaning of particular provisions in it.*"

Again, at page 89:

> "The circumstances under which the Act of 1862 was passed, the purposes to be accomplished by it, and

> its scope and effect, are inconsistent with the position assumed by the appellant."

We insist that when this court considers the purposes to be accomplished by the Act of 1883, it will be necessarily forced to the conclusion that those purposes do not exist in connection with the operation of the Terminal Company.

Ordinances and municipal regulations frequently require gates at grade crossings or flagmen. The tracks may be elevated at those particular points, the ordinance remaining unchanged, yet, I imagine, no court would say that the road was subject to the penalties provided in the ordinance if it failed to place these gates or a watching flagman on the tracks, now fifteen or twenty feet above the roadway used by the citizen.

Again, at page 91, the court said:

> "The rights of the parties rest upon a statute of the United States. Its words, as well as its reason, spirit and intention leave, in our opinion, no room for doubt as to its true meaning."

The words of the Act of 1883 apply to railroad companies using engines propelled by steam through streets, avenues and alleys. At page 23 of their brief, counsel for the District say:

> "Construing the word 'through' found in the Act of 1883, on which some argument was made in the court below, it may mean either under or over the street, the fee of the street being in the United States, which owns, as other property owners, *usque ad coelum.*"

"Through" has such a distinct and plain meaning in this connection that argument seems unnecessary. Will counsel for the District argue that if a street railway company

were authorized by federal statute to construct a street railway *through* Pennsylvania Avenue, this language would be authority for the railroad to construct either an elevated road, a surface road or a subway.

When the law was enacted all the roads were at grade, and had been constructed at grade through the streets, and the law applied to the situation as it then existed.

In *Holy Trinity Church vs. United States,* 143 *U. S.,* 457, the court had under consideration the federal statute making it unlawful to import aliens "to perform labor or service of any kind" in the United States. The Holy Trinity Church brought under contract from England a distinguished clergyman to act as their rector. At page 458 the court said:

> "It must be conceded that the act of the corporation (the church) is within the letter of this section, for the relation of rector to his church is one of service and implies labor on the one side with compensation on the other."

Continuing, on page 459, this statement was made:

> "It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute because not within its spirit nor within the intention of its makers."

In this case the Terminal Company is not even within the letter of the statute, and certainly not within the intention of those who framed it.

At page 463 the court said:

> "Again, another guide to the meaning of a statute is found in the evil which it is designed to remedy, and for this the court properly looks at contemporaneous events, the situation as it existed and as it was pressed upon the attention of the legislative body."

When the Act of 1883 was adopted, the evil which it was designed to remedy was the danger that attached to grade crossings. That was the situation as it then existed and as it was pressed upon the attention of the legislative body. The evil did not exist in 1908. But counsel for the District argue that a *greater,* though a *different,* evil did exist in 1908, and the law of 1883 should apply to this new condition.

At page 12 of their brief they say:

> "There has been no repeal of the Act of 1883. The Act of 1908, so far as the Terminal Company is concerned, affirms and extends the Act of 1883. If the reason for the existence of the statute had ceased, there would be strong ground for argument that the statute itself was not in force, but the contrary is the fact. The necessity for lighting streets through which the railroads run is greater now than it was when the statute was enacted. Then all crossings were at grade and received on clear nights, at least, the light of the moon and stars. Now, very many of the crossings are below grade. The overhead structure carrying the tracks of the roads are supported in all cases by double rows of iron pillars planted in the street."

If we understand this language, it declares three propositions:

1st. That there having been no repeal of the Act of 1883, it is still operative and effective so far as any steam railroad may move its trains over tracks laid through the streets at grade.

2nd. That the Act of 1908 affirmed and extended the Act of 1883, so far as the Terminal Company is concerned.

In other words, that until the Act of 1908 was approved, the Act of 1883 did not affect the Terminal Company, but why this argument, when the Act of 1908, if constitutional, is broad enough in its scope to absolutely cover, by express language, the Terminal Company; and, further-

more, was enacted because of the distinct statement of the District that the Act of 1883 could not be applied to the Terminal Company. If the Act of 1908 extended the Act of 1883 to the Terminal Company, the extension could not be effective until the last act was passed, and therefore the logic of the argument seems to be that the Terminal Company, if subject to the provisions of the Act of 1883, is only subject to them after the extending or affirming Act of 1908.

3rd. That there is actually greater danger to the public using streets where the railroad tracks are carried over the highways, or the municipal highways carried over the tracks, than where the railway tracks are at grade.

If this argument be true, then the hundreds of millions of dollars that have been expended to elevate railway tracks in the cities of New York, Boston, Philadelphia, Chicago, Washington, and elsewhere, has not only been money wasted, but money expended to the detriment and increased hazards and perils of the citizens who called for this protection so unceasingly and with such determination, that various legislatures imposed enormous financial burdens upon the railroads, and in many instances the cities aided by municipal contribution.

We had supposed that the lighting of streets was based upon the quantum of light necessary, not on nights when moon and stars were brilliant in a cloudless sky, but on nights when nature's lamps were unlighted. In other words, that the quantum of light was measured by the greatest necessity for light.

We conclude the argument on this branch of the case by quoting from the Act of 1903 language which indicates the purpose of Congress to relieve the Terminal Company of further expense with regard to the streets after their costly overhead structures were completed. Congress having, in the fullness of its authority, denied to the Terminal Com-

pany the right of laying a track upon the streets, and having required the company to grade and pave these passageways at the time of their construction, then remitted these streets absolutely to the District.

In Sec. 3, of the Act of 1903, we find these words:

> "Provided, however, that said Terminal Station and viaduct shall be so constructed as to permit H, K, L and M Streets and Florida Avenue to be passed and continued under the same through openings or spaces of sufficient clearance to permit the use of said streets and avenues in the form and manner and of the dimensions shown and indicated on the plan and profiles agreed upon between the Baltimore and Ohio Railroad Company, the Terminal Company, and the Philadelphia, Baltimore and Washington Railroad Company and the Commissioners of the District of Columbia, and filed in the office of the Engineer Commissioner; *and the said Terminal Company shall also grade and pave the said passageways at the time of their construction to the satisfaction of the Commissioners of the District of Columbia, but thereafter the maintenance of the pavements and roadways shall be provided for as in the case of other public highways in the District of Columbia.*"

This language places these streets which are under the viaduct or overhead bridges, in exactly the same status as every other highway of the District of Columbia. When the tracks had been taken off of the streets, no duty remained for the railroads to perform with regard to the streets, and there remained no legal basis for laying a specific burden upon the Terminal Company, which is a tax-payer like every other property owner in the District, different from that laid upon other tax-payers. No legal reason remained why the Terminal Company should light these streets, because there was no danger coming to the public from the Terminal's overhead tracks.

SECOND POINT.

THE CLAUSE IN THE ACT OF CONGRESS OF MAY 26, 1908, RELIED UPON IN THE SECOND COUNT OF THE AMENDED DECLARATION IS UNCONSTITUTIONAL UNDER THE PROVISIONS OF THE FIFTH AMENDMENT OF THE FEDERAL CONSTITUTION, IN THAT IT DEPRIVES THE TERMINAL COMPANY OF PROPERTY WITHOUT DUE PROCESS OF LAW, TAKES PRIVATE PROPERTY FOR PUBLIC USES WITHOUT COMPENSATION, AND AS AN ATTEMPTED EXERCISE OF POLICE POWER IS BEYOND CONSTITUTIONAL AND LEGAL LIMITATIONS.

A.

The Acts of 1901 and 1903 were passed after a long. patient and exhaustive study by the Congress, through appropriate committees, of the large and important questions involved. These acts embody a complete determination of Congress as to the total burdens to be borne by the Terminal Company and the railroads, in connection with the great work required. The legislation is unusually specific and detailed. The exact location of all overhead structures fixed. The sum total of expense to be borne by the Terminal Company with regard to the streets over which its tracks are lifted determined, and not a suggestion that any additional or further expenditure with regard to these streets should be laid on the company.

Under the Act of 1903 the company is absolutely restricted to the use and occupation of certain designated, defined locations, both for station uses and track purposes. Every square inch of this station area is lighted by the company, with its own electric plant and at its own cost. There is no necessity for light on its overhead structures,

either for the protection of the public using the streets below, or for the protection of the passengers or trainmen on the engines or cars passing over these overhead bridges. The public can not use them, and each locomotive must carry its own headlight. The lights placed on the streets below and beneath these overhead structures can be and are of no benefit to the company, but are for the exclusive accommodation, benefit and protection of the public traveling on the streets.

The lighting of streets is a municipal duty, and the cost of this lighting is a proper charge against the general municipal fund composed of contributions made by all property owners. A certain portion of this municipal income arising from taxes levied is devoted to the payment for municipal lighting.

The Terminal Company is a tax-payer, just as any other property owner in the District. Sec. 6 of the Act of 1903, subjects all its property to municipal taxation. The proportionate part of the whole tax paid by the company that is assigned by the municipal government to the lighting fund, returns no direct benefit to the company, which lights its own property, but is devoted to payment of the cost of lighting streets used by the general public. The act under consideration requires the company to pay, in addition to its full legal contribution to the general tax fund of the District of Columbia, such additional sums as in the uncontrolled judgment of the Commissioners of the District is necessary "for the lighting of the streets, avenues, alleys and grounds over and under which its right of way may cross, as well as for the lighting of those streets, avenues, alleys and grounds bordering on its right of way." This sum, from the record, amounts now to about $4,500.00 per annum. What it will be next year, or the following year, depends entirely upon the action of the uncontrolled

judgment of the Commissioners of the District of Columbia. Neither the health, comfort nor physical safety of the public using these streets is impaired or endangered by these overhead structures which the Congress required to be constructed.

While the police power is not subject, perhaps, to absolute definition or to definite limitations, yet the courts have not hesitated to indicate that its reach and scope are not limitless, and that by virtue of its indefiniteness, the property of tax-payers does not stand absolutely at the mercy of legislative power.

If this company, one tax-payer of the District, is compelled to pay the full charge for lighting certain streets, or portions thereof, then the sum total of governmental and municipal expenditure for lighting is lessened to that extent, and one tax payer forced to bear a burden which should be borne in equal proportion by all tax-payers. If this law be upheld, the general expenses of the District for lighting will be reduced pro rata by all sums required under this law to be paid into the Treasury of the District Government by this one tax-payer.

In the hearing before the Senate sub-committee, hereinbefore referred to, the President of the District Commissioners made this thoroughly apparent when he said, at page 60, that unless the provision now being discussed was made a part of the Appropriation Act of the District of Columbia, the appropriation for street lighting would have to be increased to meet this cost, not to meet an additional cost required by the construction of overhead bridges, but to meet the ordinary expenses of continuing the lighting of the streets at the various points named. There is no claim that they were not being lighted before the overhead structures were built, as other streets were.

In the case of Norwood against Baker, 172 U. S., 269, the Supreme Court said:

> "But the power of the legislature in these matters is not unlimited. There is a point beyond which the legislative department, even when exerting the power of taxation, may not go consistently with the citizen's right of property. As already indicated, the principle underlying special assessments to meet the cost of public improvements is that the property upon which they are imposed is peculiarly benefited, and therefore the owners do not, in fact, pay anything in excess of what they receive by reason of such improvement. But the guaranties for the protection of private property would be seriously impaired, if it were established as a rule of constitutional law, that the imposition by the legislature upon particular private property of the entire cost of a public improvement, irrespective of any peculiar benefits accruing to the owner from such improvement, could not be questioned by him in the courts of the country."

While this decision construes a state constitution, yet the objections to the constitutionality of the State consitution were based upon the Fourteenth Amendment, which in part is identical in language with the Fifth Amendment. If the law were otherwise, there could be absolute confiscation of private property for public use without compensation.

In Regan vs. Farmers' Loan and Trust Company, 154 U. S., 362, we find, at page 399, the following forceful statement:

> "This, as has been often observed, is a government of law, and not a government of men, and it must never be forgotten that under such a government, with its constitutional limitations and guarantees, the forms of law and the machinery of government, with all their reach and power, must, in their actual workings, stop

> on the hither side of the unnecessary and uncompensated taking or destruction of any private property, legally acquired and legally held."

Story, on the Constitution, Sec. 1790:

> "Indeed in a free government almost all other rights would become utterly worthless if the government possessed an uncontrollable power over the private fortune of every citizen. One of the fundamental objects of every good government must be the due administration of justice; and how vain it would be to speak of such an administration, when all property is subject to the will or caprice of the legislature and the rulers."

While Congress, under the Federal Constitution, has exclusive power to legislate for the District of Columbia, yet that power is limited by other clauses of the same Constitution, and the Fifth Amendment declares positively that no private property can be taken for public use without just compensation.

Counsel for the District presenting their argument as to the legality of the provision of the Act of 1908, now under consideration (brief, pages 4 to 9, inclusive), content themselves with saying, on page 4:

> "If this legislation is unauthorized, then there seems to be a very general misapprehension on the part of the courts throughout the country as to the powers of legislation and of Congress."

In support of that position they cite, on pages 5 to 9, inclusive, decisions of various courts, District, State and Federal. A study of these cases indicates conclusively that the great majority of the decisions are based upon the general power of a State or of the Congress to enact legislation under the general police power to provide for the health,

comfort and safety of the people. This power is not denied, and therefore the cases require no detailed analysis.

The first cases cited are decisions in this District, where the constitutionality of a charter provision, requiring street car companies to pave space within the tracks and for two feet on each side, was upheld. The very charters granting existence to these street railway companies and accepted by them, made this a condition, and furthermore, they occupied the bed of the street which the people had a right to use in connection with the street car companies.

Cases are cited to show that railroad companies can be compelled to light crossings in streets. These again were grade crossings, and the safety of the public is the basis for the law. The cases cited where the laws requiring grade crossings to be abolished, forbidding the employment by railroads of color-blind persons, to require locomotive engineers to be examined, to require passenger cars to be heated with certain appliances, restricting the speed of trains within city limits to a designated rate per hour, requiring trains to whistle on approaching crossings, etc., were cases considering statutes based upon the power of the state to protect its citizens, whether travelers on highways or passengers on railway trains or trainmen themselves, from the dangers incident to railway transportation. But the courts have not hesitated to say that such legislation and Congressional enactments are subject to investigation in the courts, with a view to determining whether the law is a lawful exercise of the police power, or whether there has been an unwarranted and arbitrary interference with the constitutional rights of the citizen.

In Lawton vs. Steele, 152 U. S., 133, Mr. Justice Brown, speaking for the court, said:

> "To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that

> the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. *In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts.*"

In Holden vs. Hardy, 169 U. S., 366, the court said, at page 398:

> "The question in each case is whether the legislature has adopted the statute in exercise of a reasonable discretion, or whether its action be a mere excuse for an unjust discrimination, *or the oppression, or spoliation of a particular class.*"

In Connolly vs. Union Sewer Pipe Company, 184 U. S., 540, Mr. Justice Harlan, delivering the opinion of the court, at page 558, said:

> "The question of constitutional law to which we have referred cannot be disposed of by saying that the statute in question may be referred to what are called the police powers of the State, which, as often stated by this court, were not included in the grants of power to the General Government, and therefore were reserved to the States when the Constitution was ordained. But as the Constitution of the United States is the supreme law of the land, anything in the Constitution or statutes of the States to the contrary notwithstanding, a statute of a State, even when avowedly enacted in the exercise of its police powers, must yield to that law. * * * The State has undoubtedly the power, by appropriate legislation, to protect the public

> morals, the public health and the public safety, but, if by their necessary operation, its regulations looking to either of those ends amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void."

The argument applied to the Acts of State legislatures applies to this Act of Congress. If, through the Act of 1908 Congress has deprived the Terminal Company of a portion of its property without due process of law, has taken this private property for public use without compensation, or has denied to the company the equal protection of the laws, or laid this burden upon it under the guise of protecting the public from danger not existing, then it is the duty of the Court to so say. If the Congress, by an arbitrary act, should declare that property vested in A should by virtue of the act become the property of B, or of the District of Columbia, no court would hesitate to declare the act void and without binding force.

At page 12 of their brief, counsel for the District refer to the H Street viaduct as an *"extreme illustration."* This viaduct was constructed, as directed by Congress in the third section of the Act of 1903, and as approved by the District Commissioners.

We will now use an illustration of the "extreme" length reached under this law in the attempt to force upon the Terminal Company payment for cost of street lighting, and which has the same legal, constitutional basis that would exist in the case of a law enacted by Congress simply requiring A to pay the debts of B.

In both counts recovery is sought for the cost of "ten electric lamps on Second Street from H to M, N. E." (Rec., pp. 3, 4). Under Sec. 2, Act of 1908, a portion of the western boundary of the terminal area is stated as follows:

> "Thence eastwardly along the south line of L Street, Northeast, to a point in the intersection of the west line of Second Street, Northeast; thence south along the west line of Second Street, Northeast, to a point about 80 feet north of the north line of H Street, Northeast."

By reason of conditions existing, the Terminal Company necessarily constructed along the entire west line of Second Street a retaining wall between eighteen and nineteen feet high, except at I Street, where the brick buildings occupied by the express companies were erected. So the entire side of the terminal property on Second Street consists of either a solid wall nearly nineteen feet high, or a brick building. This interferes with the use, safety and light of Second Street no more than would a row of two-story brick buildings erected by a citizen along the west margin of this street. Within the terminal area, nineteen feet above the street level, and no place less than eleven feet back from the building line of Second Street, is one of the tracks laid within the terminal area.

Under these conditions, where, under our Constitution, exists the right and power authorizing a legislative body to devolve on one tax-payer the entire cost of lighting this street whose use by the public is in no way interfered with, impaired or endangered by this tax-payer?

If we were inclined to be technical, we might argue further that the phrase "right of way" has a fixed legal meaning, and that Second Street does not border on the right of way of the Terminal Company.

The only basis that we have been able to discover for the action on the part of the District Commissioners in submitting to Congress the proviso in the Act of 1908 relied upon, was the desire of those Commissioners to lessen annual expenditures on the part of the District by com-

pelling one tax-payer of the District to bear individually a portion of necessary municipal expenditure.

B.

The attention of the court is now directed to the exact language of this act. It requires the Terminal Company to pay to the District *"for the lighting of the streets, avenues, alleys and grounds over and under which its right of way may cross, as well as for the lighting of those streets, avenues, alleys and grounds bordering on its right of way."*

The language of the act is mandatory. It says "shall pay to the District for the lighting of the streets, avenues, alleys and grounds, over and under which its right of way may pass, as well as for the lighting of those streets, avenues, alleys and grounds bordering on its right of way." Under this language it is the absolute duty of the Terminal Company to pay to the District for the lighting of the *entire length* of any street or avenue over or under which its road may cross. The Terminal's tracks cross over H and other streets. Under this act it must pay for the lighting of these streets from end to end, for lights that may be a mile, two miles or three miles removed from the actual point where the tracks are carried over the streets by bridges or viaducts.

It is not in the power of the courts by judicial decision to limit a liability fixed by Congress. If the District Commissioners should limit their charges for lighting to the exact points where the tracks pass over a public avenue or street, that still would not affect the language of the act or the constitutionality or unconstitutionality of the act, which depend not upon the construction put upon it by the District Commissioners, but upon the exact language used by the Congress in the act itself.

In Maxwell vs. Moore, 22 Howard, 185, the court said:

> "Where the legislature makes a plain provision, without making any exception, the courts of justice can make none, as it would be legislating to do so."

The Supreme Court has held repeatedly that a law unconstitutional by reason of the reach and scope of its terms, embracing subjects upon which the Congress could constitutionally legislate, and subjects upon which it could not constitutionally legislate, can not be limited by the construction of the courts so as to apply alone to those constitutionally embraced within the language of the act. This was decided in the Employers' Liability Act decision so recently rendered by the Supreme Court, in which opinion a number of cases were cited sustaining that position. 207 U. S., 463.

It is not within the spirit of our law that uncontrolled power should rest anywhere, but certainly it should not be granted where the result might be as in this case, the requiring one tax-payer to bear the entire burden of a cost and charge which should be borne by the entire body of tax-payers or contributors to the general public fund.

THIRD POINT.

THE ACT OF CONGRESS OF MAY 26, 1908, RELIED ON IN THE SECOND COUNT OF THE AMENDED DECLARATION, DID NOT BECOME LAW AND EFFECTIVE UNTIL AND INCLUDING JULY 1, 1908.

A.

This act is an appropriation act for the District of Columbia for the fiscal year ending June 30, 1909, and we insist that recovery under it can not be had for the month of June, 1908, even though the Court overrule our second point and holds the act constitutional.

We admit that Acts of Congress, as a rule, take effect from the date of their approval by the President, but this is true only where no time is fixed for the law to become effective. In Matthews vs. Zane, 7 Wheaton, 164, Mr. Chief Justice Marshall said:

> "The known rule being that a statute for the commencement of which no time is fixed, commences from its date."

Under Sec. 237 of the Revised Statutes, the fiscal year of the government begins on the first day of July of each year, and the Appropriation Act does not become effective until the first of July of the current year for which it is adopted. This is the absolute rule with regard to the appropriation bill for the District of Columbia. The sums appropriated for lighting purposes in that act were fixed in view of the reduction of the total amount arising through the collection during the fiscal year for which the appropriation was made of these very sums to be repaid to the District by the defendant company.

The statement made before the sub-committee of the Senate by the President of the Board of Commissioners indicates this clearly. It is one entire act, including the fiscal affairs of the District, its expenditures and receipts for the fiscal year beginning July 1, 1908, and if the Terminal Company should be compelled to pay the amount claimed due for June, it would be paying for the expenses of the District for the fiscal year that ended June 30th, 1908, and not for the fiscal year that the bill provided for.

B.

Again, the language of the act is that "hereafter" the Terminal Company shall pay for this lighting. The decisions of the courts are that the words "upon the passage"

or "before the passage" or "after the passage" or "hereafter" have reference to the time when the act goes into effect, and not to the date of the passage or approval of the act.

In the case of Evansville and Crawfordsville R. R. Company vs. Barbee, 74 Indiana, at page 171, the court quoted the language of the act as follows:

> "Appeals in all cases hereinafter tried must be taken within one year from the time the judgment is rendered. In all cases heretofore tried, must be taken within one year from the time this act takes effect."

The act was approved March 14, 1877, but did not take effect until July 2, 1877. The court then said:

> "The question is, is this law to be construed as speaking from the time of its approval or from the time it took effect? We think the law must be construed to speak from the time it took effect, as a will speaks from the time of the death of the testator; and that the words 'hereafter' and 'heretofore' have reference to that period of time."

In the case of Jackson vs. Garland, 64 Maine, at page 136, the court said:

> "The objection that the words 'already sustained' must be construed as referring to the date of the act cannot prevail. An act is of no force until it becomes a law. The words must be construed as if spoken when the act takes effect; in legal contemplation that is the time when they are spoken."

And again, in the same case:

> "The objection that the words 'already sustained' must be construed as referring to the date of the act cannot prevail. An act is of no force until it becomes

> a law. The words must be construed as if spoken when the act takes effect; in legal contemplation that is the time when they are spoken."

On this point we also cite The People vs. Inglis, 161 Ill., at page 262; Harding vs. People, 10 Colo., at page 392.

We ask that this Court confirm the action of the Supreme Court of the District in sustaining the demurrer of the Terminal Company to the first count of the amended declaration, and reverse the action of that court in overruling the demurrer of the defendant company to the second count.

Respectfully submitted,

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Court of Appeals, District of Columbia.

OCTOBER TERM, 1910.

Nos. 2174, 2175.

WASHINGTON TERMINAL COMPANY

vs.

DISTRICT OF COLUMBIA.

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vs.

WASHINGTON TERMINAL COMPANY.

BRIEF FOR THE DISTRICT OF COLUMBIA.

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BRIEF FOR THE DISTRICT OF COLUMBIA.

Statement of the Case.

This was an action of debt brought under two statutes by the District of Columbia against the Washington Terminal Company to recover from the defendant costs of lighting certain streets, avenues, and grounds along the defendant's right of way.

The declaration contains three counts. The first seeks to recover from the defendant under the act of Congress of March 3, 1883 (22 Stats. at Large, 466), which provides—

> "That hereafter all railroad companies using engines propelled by steam shall pay to the District for the lighting of the streets, avenues, alleys and grounds through which their tracks may be laid, under the direction and control of the Commissioners; and in case of default of payment of such bills, actions at law may be maintained by the District of Columbia against said railroad companies therefor."

This count alleges that the defendant is a railroad company using engines propelled by steam, within the meaning of the act, and that the plaintiff lighted, or caused to be lighted, certain avenues, streets, and grounds set out in the bill of particulars attached to the declaration, through which the tracks of the defendant were laid, and that the plaintiff paid for such lighting $1,983.38, for which the defendant became liable under the act quoted, and which sum they refused to pay in whole or in part.

The second count of the declaration claims the sum of $1,042.04, which the plaintiff said it paid for lighting streets, avenues, etc., under the provisions of the act of May 26, 1908 (35 Stats. at Large, 286), which provides—

> "That hereafter the Washington Terminal Company, its successors, or transferees shall pay to the District for the lighting of the streets, avenues, alleys and grounds over and under which its right of way may cross, as well as for the lighting of those streets, avenues, alleys and grounds bordering on its right of way, under the direction and control of the Commissioners; and in case of default of payment of such bills, actions at law may be maintained by the District of Columbia against such Terminal Company or its successors or transferees therefor."

This count was similar to the first count, differing only in the amount claimed and in the act relied upon.

The third count of the declaration was on the common counts, and this count was withdrawn temporarily for the purpose of permitting a demurrer to be filed with the declaration.

The court below sustained the demurrer to the first count, and held that the District was not entitled to recover, under the act of 1883, on account of the changed physical conditions, which could not have been in the contemplation of Congress at the time the act was passed. Judgment was for the defendant under this count.

The demurrer to the second count, under the act of 1908, was overruled and the plaintiff was permitted to recover. The parties elected to stand upon their pleadings, and judgment was accordingly entered for the defendant under the first count and for the plaintiff under the second count. Both parties have appealed from this judgment.

Assignment of Errors.

The court below erred—

1. In sustaining the demurrer to the first count of the plaintiff's declaration.

2. In holding that the plaintiff was not entitled to recover under the act of 1883.

ARGUMENT.

I.

The Act of 1908.

Did Congress exceed its power when it required the Terminal Company to pay for lighting the streets over and under its right of way or which border on its right of way?

The incorporation of the Terminal Company was authorized by the act of February 12, 1901, section 10 (31 St., 774). The company was incorporated about December 6, 1901, pursuant to this authority. The act of February 28, 1903, to provide for a Union Station, recognizes this corporation and confers many powers upon it and imposes many duties (32 St., 909).

The incorporation of the company was directed to be under sections 618 to 676 of the Revised Statutes of the District of Columbia, being a sub-chapter of the general incorporation laws then in force, under the sub-title of "Railroads."

By the act of 1903 the cost of the Union Station was fixed at four million dollars. Under the acts of 1901 and 1903, three millions were paid to the B. & O. and the P., W. & B. R. R. (one million and a half to each).

In the act of May 26, 1908, the Terminal Company was expressly named by Congress as responsible for the cost of lighting the "streets, avenues, alleys, and grounds over and under which its right of way may cross, as well as for the lighting of those streets, avenues, alleys, and grounds bordering on its right of way."

If this legislation is unauthorized then there seems to be a very general misapprehension on the part of the courts throughout the country as to the powers of legislatures and of Congress.

From the number and variety of conditions which have been imposed upon railroads by the different legislatures of the States and by Congress, and upheld by the State courts and by the Supreme Court of the United States, one would consider little doubt to exist in the present case. A few illustrations will suffice:

One of the commonest conditions imposed upon railroads is to require them to pave the whole or a portion of the width of the street occupied.

27 Am. & Eng. Enc., 40.

In this jurisdiction the usual condition is to pave the space between the tracks and for two feet on each side.

D. C. *vs.* Washington R. R., 1 M., 361.

D. C. *vs.* Washington R. R., 4 M., 214.

They may be made to pave to correspond with an improved surface laid by the municipality.

27 Am. & Eng. Enc., 42.

They may be required to pave or repair the *whole* width of the street.

27 Am. & Eng. Enc., 43.

May be required to pave where no pavement exists, or to remove a pavement and construct a different one.

D. C. *vs.* R. R., 4 M., 214.

Railroad companies may be compelled by *ordinance* to light crossings and streets; also to light its tracks.

Elliott on Roads & Streets, sec. 801, N.

3 Abbott Mun. Corp., p. 2030.

McQuillan on Mun. Corp., sec. 474.

Shelbyville *vs.* Cleveland, 146 Ind., 66.

Cleveland *vs.* Connersville, 147 Ind., 277.

Louisville R. R. *vs.* Bessemer, 108 Ala., 238.

Newark *vs.* R. R., 55 N. J. L., 605.

St. Bernard *vs.* R. R., 4 Ohio Low. D., 371.

R. R. *vs.* Bowling Green, 57 Ohio St., 336.

Municipal regulation may require tracks to be fenced. Where a contract between the city and the road was contemplated, but never executed, the court held the regulation to be of a higher nature—*i. e.*, a municipal regulation.

Hayes *vs.* R. R., 111 U. S., 228, 237.

Statute may allow double damages to stock occasioned by a failure to fence its right of way.

R. R. *vs.* Hume, 115 U. S., 512:

In this case held that the company was not deprived of its property without due process of law.

May be required to abolish grade crossings at its own expense.

R. R. *vs.* Bristol, 151 U. S., 556.

May be compelled to pay damages to adjoining farms by reason of its failure to fence its right of way.

R. R. *vs.* Emmons, 149 U. S., 364.

An Alabama statute was upheld forbidding the employment of color-blind persons.

R. R. *vs.* Alabama, 128 U. S., 96.

May be made liable for fires set by engines without regard to negligence.

R. R. *vs.* Matthews, 165 U. S., 1.

May be made liable for injuries to employees occasioned by fellow-servants.

R. R. *vs.* Pontius, 157 U. S., 209.

Tullis *vs.* R. R., 175 U. S., 348.

May be made to furnish track connections where roads intersect.

Wis. R. R. *vs.* Jacobson, 179 U. S., 287.

May be required to lower a tunnel under a river built under authority of a *municipal ordinance* at its own expense.

Chicago R. R. *vs.* Chicago, 201 U. S., 506.

May be made to widen a bridge at its own expense when necessary to drain adjoining lands.

R. R. *vs.* Drainage Co., 200 U. S., 561.

A Texas law forbidding railroads to allow growth of Johnson grass or Russian thistle to go to seed on its right of way was upheld, there being no similar prohibition as to other land-owners.

R. R. *vs.* May, 194 U. S., 267.

May be required to install and maintain safety appliances.

R. R. *vs.* Osborn, 189 U. S., 383.

R. R. *vs.* Richmond, 96 U. S., 521.

Worcester *vs.* R. R., 109 Mass., 103.

Where a railroad constructed a bridge 18 feet above grade by order of the *municipality*, it might be required to lower the bridge to grade by another order of the municipality, at its own expense.

Wabash R. R. *vs.* Defiance, 167 U. S., 88.

In this case it was said that the language relied upon by the road was rather an ordinance than a contract; to be a contract it must be "in language that would admit of no other interpretation" (p. 94). See also R. R. *vs.* Nebraska, 170 U. S., 57.

A railroad may be compelled to furnish adequate passenger service from a point within the State to the State line, although done at a loss.

Missouri P. R. Co. *vs.* Kansas, No. 9 Adv. Sheets, 330, citing Atlantic Coast Line *vs.* N. Car. Corporation, 206 U. S., 1.

Congress has the power to declare a bridge over the Monongahela River, erected by the Monongahela Bridge Co. in 1830, under the authority of the General Assembly of Pennsylvania, to be an obstruction to navigation, and to require its alteration so as to provide for the passage of larger water craft, the river being an interstate waterway, and no obligation is imposed upon the United States to make compensation for such change.

Monongahela Bridge Co. *vs.* U. S., Adv. Sheets No. 9, p. 356, April 1, 1910.

In Smith *vs.* Alabama, 124 U. S., 465, it was held that it was within the police power of a State to require locomotive engineers to be examined and licensed.

In N. Y., N. H. R. R. *vs.* N. Y., 165 U. S., 628, a law regulating the heating of passenger cars and requiring guard posts on bridges was sustained.

In Lake Shore *vs.* Ohio, 173 U. S., 286, it was held to be a valid enactment to require railway companies operating within the State of Ohio to cause three of its regular passenger trains to stop each way daily at every village containing over three thousand inhabitants.

In Erb *vs.* Morasch, 177 U. S., 584, it was held that the municipal ordinances of Kansas City, Kansas, although applicable to interstate trains, which restricted the speed of all trains within the city limits to six miles an hour, was a valid exercise of the police power of the State.

In Crutcher *vs.* Kentucky, 141 U. S., 47, the court said:

> "It is also within the undoubted province of the State legislature to make legislation in regard to the speed of railroad trains in the neighborhood of cities and towns; with regard to the precaution to be taken in the approach of such trains to bridges, tunnels, deep cuts and sharp curves, and, generally, with regard to all operations in which the lives and health

> of people may be endangered, even though such regulations affect, to some extent, the operations of interstate commerce. Such regulations are eminently local in their character, and, in the absence of congressional regulations over the same subject, are free from all constitutional objections and unquestionably valid."

In Sou. Ry. *vs.* King, Adv. Sheets, June 15, 1910, No. 14, p. 594, a statute of Georgia was upheld requiring trains to whistle on approaching crossings, and to slacken speed and to continue to slacken speed as the crossing was approached.

The road might be made to pay for a pavement already in existence.

D. C. *vs.* Met. R. R., 8 App., 322, 347.

In Met. R. R. *vs.* Macfarland, 20 App., 421, 438, the court upheld a statute making the Columbia Railroad liable to assessment for benefits, as were property-owners, for the extension of Columbia road.

In B. & O. R. R. *vs.* D. C., 10 App., 111, an ordinance was upheld requiring all railroad trains to stop at crossings.

II.

The Act of 1883.

The act of 1883 has been generally acquiesced in since its passage by the various steam railroads using the streets of the city, and there has been no dispute, of which we are aware, with the railroads concerning their liability for lighting streets or parts of streets occupied by their tracks.

In the act of July 1, 1882, 22 Stat., 139, is found this provision:

> "And hereafter all railroad companies using engines propelled by steam shall *provide* for the light-

> ing of the streets, avenues, alleys, and grounds through which their tracks may be laid, under the direction and control of the Commissioners."

In the act of March 3, 1883, under which the first count is laid, 22 Stats., 466, differs from the above in that the railroads—

> "shall *pay* to the District for the lighting," &c.,

in lieu of—

> "shall *provide* for the lighting," &c.,

and by the addition of the provision that the District may maintain a suit for the sums due for such lighting. The latter provision was, as a matter of law, unnecessary, because the liability having been created the remedy would follow as a matter of necessary implication. It emphasized the determination of Congress, however, that the railroads should bear the cost of such lighting.

The first change was important. It took out of the hands of the roads the work of lighting and placed that duty upon the municipality. This was, of course, desirable, as it tended to secure a uniform method and amount of lighting.

The court below held that the District was not entitled to recover under this act because of the changed physical conditions; that entirely different conditions existed at the time the act was passed from what exist now, and that the present situation could not have been within the contemplation of Congress when the act was passed.

It is submitted that this is not a sufficient reason for annulling the act. Physical conditions change so rapidly at the present time, especially within the limits of large cities, to meet the necessities of a changing and growing civilization, that the tenure of any statute might be brief indeed if that tenure were limited by judicial construction to the

physical limitations existing at the time of its enactment. Such judicial interpretation is sometimes met with in reports of criminal cases, but the contrary is the rule. A familiar instance is the law applicable to bicycles. Some fifteen or twenty years ago a desire for bicycle riding suddenly seized the popular fancy. It rapidly spread to all classes, and soon large numbers of the population were riding bicycles. There were no statutes or regulations at that time which applied to bicycles, but the courts promptly held, in their absence, that these instrumentalities were vehicles, and must be so regarded within the purview of statutes and regulations applicable to vehicles.

Huddy on Automobiles, p. 9, and cases there collected.

Likewise it has been often held that automobiles are vehicles.

Gassenheimer *vs.* D. C., 26 App. D. C., 557.
Huddy on Automobiles, p. 10.

In Taylor *vs.* Goodwin, 4 Q. B., 228 (1879), it was held that a person riding a bicycle at a dangerous pace might be convicted of furiously driving a "carriage" under Eng. St. 5 and 6 Wm. IV, c. 50, sec. 72. Lush, J., said:

> "The mischief intended to be guarded against was the propulsion of any vehicle so as to endanger the lives or limbs of passers by. It is quite immaterial what the motive power may be. Although bicycles were unknown when the act was passed, it is clear that the intention was to use words large enough to comprehend any kind of vehicles which might be propelled at such speed as to be dangerous" (p. 6).

And in Thompson *vs.* Dodge, 58 Minn., 555, 28 L. R. A., 608, it was said that bicycles were not to be banished from

the highways "because they were not ancient vehicles and used in the garden of Eden by Adam and Eve."

There has been no repeal of the act of 1883. The act of 1908, so far as the Terminal Company is concerned, affirms and extends the act of 1883. If the reason for the existence of the statute had ceased, there would be strong ground for argument that the statute itself was not in force. But the contrary is the fact. The necessity for lighting streets through which the railroads run is greater now than it was when the statute was enacted. Then all crossings were at grade, and received on clear nights, at least, the light of the moon and stars. Now very many of the crossings are below grade. The overhead structure carrying the tracks of the roads are supported in all cases by double rows of iron pillars planted in the street. To take an extreme illustration, H street, north of the Union Station, is carried below grade for over a thousand feet, nearly one-fifth of a mile, and the tracks overhead are supported by two rows of iron pillars planted in the roadway adjacent to the street-car tracks. In this subway, even on the brightest day, there is only a gray twilight. This condition is caused by structures erected by the Terminal Company. That they were erected under the authority and direction of Congress does not lessen the necessity for lighting this subway, and the amount of light now required to make this thoroughfare safe and convenient for travel at that place is greater than at any previous time in its history, owing solely to the presence of the overhead tracks.

On this subject a well-known text writer observes:

> "§ 112. Extension to New Things.—Except in some few cases where a statute has fallen under the principle of excessively strict construction the language of a statute is generally extended to new things which were not known and could not have been contemplated by the legislature when it was passed.

This occurs, when the act deals with a genus, and the thing which afterwards comes into existence is a species of it. Thus, the provision of Magna Charta which exempts lords from the liability of having their carts taken for carriage was held to extend to degrees of nobility not known when it was made, as dukes, marquises, and viscounts. The 17 Geo. 2 (A. D. 1744), which gave parishioners the right of inspecting the accounts of church wardens and overseers under the poor law of Elizabeth, was held to extend to those of guardians, officers who were created by Gilbert's act (22 Geo. 3), passed in 1783. The 13 Eliz., c. 5, which made void, as against creditors, transfers of lands, goods and chattels, did not originally apply to copyholds or choses in action, as these were not seizable in execution; but when they were made subject to be so taken (1 & 2 Vict., c. 110), they fell within the operation of the act. The act of Geo. 2, which protects copyright in engravings by a penalty for piratically engraving, etching, or otherwise, or 'in any other manner' copying them, extends to copies taken by the recent invention of photography. A statute authorizing counties to take stock in railroads is applicable to stock of railroads organized under a subsequent statute; and the operation of a law for regulating 'all existing railroad corporations,' extends to railroads incorporated after, as well to those incorporated before its passage, unless excepted from its provisions by their charters. So a provision in a statute in favor of an alien 'who shall have resided within the state two years,' applies to future and past residence alike. And under an act providing that the expenses of the borough and township elections, in a certain county, 'held in March annually,' should be paid by the borough and townships respectively, they remained liable for the ex-

penses of such elections, notwithstanding a subsequent change, by statute, in the date of the same; nor did the conversion of a borough into a city affect its liability under the act; just as the Massachusetts act of 1817, ch. 50, providing that prosecutions under the by-laws of Boston might be in the name of the Commonwealth, remained unchanged, in that particular, by the act which incorporated the town of Boston as a city. Thus again, a provision of an act giving justices of the peace civil jurisdiction in cases involving not more than $100, made the judgment of the court of common upon certiorari to the judgment of such justices final, and forbade the issuing of a writ of error to the same by the Supreme Court; and it was held that this provision applied to certioraries in suits under a later act increasing the civil jurisdiction of justices to $300. Similarly, where a corporation originally incorporated as a road and bridge company, was by a subsequent statute permitted to form itself into two companies, one a turnpike, the other a bridge company, it was held that the penalties imposed by the original act upon the officers of the corporation created by it extended to the officers of the new turnpike company. So, an act dividing a county, and creating, out of a portion of dividing a country, and creating, out of a portion of the old county, a new one, with a new name, was held not to repeal, as to the latter the special laws in force in the whole territory covered by the original county, but the same were held to extend to and remain in force in the new county. A statute limiting the time or place within which or where a designated class of offences may be prosecuted or tried, applies to offences of the same class created and punished by subsequent enactments."

Endlich on the Interpretation of Statutes, pp. 147-150.

In Reg. *vs.* Smith, L. R. 1 C. C., 266, Boville, C. J., said:

"The subject of extending statutes by inference to include cases not originally contemplated is one which has given rise to several decisions, the leading characteristic of which is that the earlier statute deals with a genus within which a new species is brought by a subsequent act. Thus, choses in action were not originally within 13 Eliz., c. 5, against fraudulent conveyance; that statute being applicable only to property which could be taken in execution. Sims *v.* Thomas, 12 Ad. & El., 536, 40 E. C. L., 117. But as to choses in action made subject to execution by 1 & 2 Vict., c. 110, there can be no doubt that by the conjoint operation of that act and the 13 Eliz., c. 5, such choses in action having become by new enactment a species of the genus property subject to execution, did, without any express enactment to that effect in the later statute, become subject to the operation of the former act. Norcutt *v.* Dodd, Cr. & Ph., 100; Barrack *v.* McCulloch, 3 Kay & J., 110."

"It has been held that penal laws should not be extended to new things which were not in being when the laws were made, nor the offenses created and defined by subsequent statutes. On the other hand it has been held that things not in use at the time of passage of a statute may be construed as within its contemplation, when words large enough to embrace them are used."

26 Amer. & Eng. Enc., 660, and cases cited in notes.

Gambart *vs.* Ball, 14 C. B. N. S., 306; 108 E. C. L., 306 (1863):

An action for infringement by the defendant of the plaintiff's copyright in two engravings, one from Rosa Bonheur's

"Horse Fair" and the other from Holman Hunt's "Light of the World," defendant had copied the engravings on a reduced scale by photography, which was an unknown art when the statute was passed under which recovery was sought (p. 319).

Held, that the plaintiff was entitled to recover, the statute being broad enough to cover copying in any manner (p. 317).

Followed in Graves *vs.* Ashford, L. R., 2 C. P., 410, 1837.

Att'y Gen. and Lockwood, 9 M. and W., 378:

A prosecution against a retailer of beer having in his possession liquorice under a statute prohibiting such retailers to have certain enumerated articles not mentioning liquorice, or any other article intended as a substitute for malt or hops (p. 378).

Held, that the action would lie (p. 397).

Collier *vs.* Worth, 1 Ex. D., 464 (1876):

Prosecution for selling fish in the town of Rochdale, contrary to the act of 1822. The fish were sold on a main thoroughfare, Molesworth street, which at the passage of the act was green fields.

Held, that the prosecution would lie (pp. 467, 468).

Parkins *vs.* Preist, 4 B. D., 413 (1881):

A steam tricycle held to be a locomotive within 20 and 21 Vict., 43, 1878, and subject to the regulations therefor under the locomotives act of 1861, although steam tricycles were then unknown (pp. 317, 318).

Queen *vs.* Collette, 16 Q. B., 412; 71 E. C. L., 412 (1851):

Indictment for continuing a toll-gate across a turnpike in the town of St. James. The toll-gate was erected in 1841

and was not then in the town (p. 415). The act was passed in 1840, under which defendant was prosecuted.

Held, that the conviction should not be disturbed (pp. 421, 422).

U. S. *vs.* Nix, 189 U. S., 199:

A territorial act of Oklahoma, applying to marshals' fees, is not superseded by the act of Congress applying to the marshals of the United States generally.

"The rule of statutory construction is well settled that a general act is not to be construed as applying to cases covered by a prior special act upon the same subject. On this principle we held in Townsend *vs.* Little, 109 U. S., 504, that special and general statutory provisions may subsist together, the former qualifying the latter. See also Churchill *vs.* Crease, 5 Bing., 177; Margone *vs.* King, 51 Fed. Rep., 525, and cases cited; State *vs.* Clarke, 25 N. S. Law, 54;" p. 205; 26 Amer. Enc., 660.

Townsend *vs.* Little, 109 U. S., 504:

A deed to certain property in Salt Lake City was made to Townsend by the mayor, pursuant to an act of the legislature, which act did not require witnesses to the deed, providing for the conveyance to occupants by the mayor of lands included in the town site; a general law of the Territory required all deeds to be witnessed.

> "According to the well-settled rule, that general and specific provisions, in apparent contradiction, whether in the same or different statutes, and without regard to priority of enactment, may subsist together, the specific qualifying and supplying exceptions to the general, this provision for the execution of a particular class of deeds is not controlled by the law of the Territory requiring deeds generally to be executed with two witnesses. Pease *v.* Witney, 5

Mass., 580; Nichols *v.* Bertram, 3 Pick., 341; State *v.* Perrysburg, 14 Ohio St., 472; Ry. *v.* B'd of Works, L. R. A., 8, c. 185; Bishop on the Written Laws, p. 112*a*. The deed of the mayor to Townsend having been executed in conformity with the special act was therefore valid and effectual to convey the legal title" (p. 512).

"The rule is, that a perpetual statute (which all statutes are unless limited to a particular time) until repealed by an act professing to repeal it, or by a clause or section of another act directly bearing in terms upon the particular matter of the first act, notwithstanding an implication to the contrary, may be raised by a general law which embraces the subject-matter, is considered still to be the law in force as to the particulars of the subject-matter legislated upon."

Cited in—

U. S. *vs.* Gear, 3 How., 120, 131.
B'k *vs.* Ins. Co., 76 Fed., 549.
The J. D. Peters, 78 Fed., 373.
Bailey L. Co. *vs.* Austin, 82 Fed., 786.
Barden *vs.* Wells, 14 Mont., 465; 26 Enc., 715.

In the case of The Union Pacific *vs.* Mason City, 199 U. S., 160, it was held that the purchaser of a railroad took it subject to regulations passed by Congress after the execution of the mortgage under which the road was sold.

In construing the revenue laws of the United States the Supreme Court has repeatedly declared that different laws upon the same subject are to be read together unless so repugnant or inconsistent as to make this impossible, and repeals by implication are not to be favored. This is, of course, the rule of law generally, but reference is had to the

cases cited below as furnishing good examples of its application.

In Movius *vs.* Arthur, 95 U. S., 144, the words "japanned, patent, or enameled leather or skins of all kinds" in the revenue act of March 2, 1861, were held not to be repealed by the words "skins dressed and finished, of all kinds not herein provided for" (p. 146).

The Distilled Spirits, 11 Wall-., 356:

The 48th section of the internal-revenue act of June 30, 1864, amended by the act of July 13, 1866, enacted:

> "All goods, wares, merchandise, articles or objects on which taxes are imposed by the provisions of law which shall be found in the possession or custody or within the control of any person or persons in fraud of the internal-revenue laws, or with design to avoid payment of said taxes, may be seized, &c., and shall be forfeited to the United States."

The 45th section of the later act enacts:

> "All distilled spirits found elsewhere than in a bonded warehouse, not having been removed from such warehouse according to law, and the tax imposed by law not having been paid, shall be forfeited."

> "The act of 1864 contained no specific provisions for the forfeiture of distilled spirits" (p. 357).

> "An examination of the act of 1864 will show that the first fifty-two sections are of a general character, intended to apply to all taxes imposed by the act, and that the 48th section is especially of that character, and applies to distilled spirits as well as all other articles. By the act of 1866 this section was

amended in a manner not material to the question at issue. When thus amended it still stood as it did before having the same office and the same general application. The addition in the act of 1866 of several new sections relating to the removal of distilled spirits from a bonded warehouse, and imposing penalties and forfeitures for giving fraudulent bonds for that purpose, or for illegally removing the spirits, does not deprive the 48th section of the act of 1864 of its general application. There is nothing incongruous or repugnant between it and the new sections. Both can stand, and an information may be founded on both or either, whenever the facts will admit. It is a very common thing for cumulative remedies to be thus provided. The act of 1868, which revises the entire revenue law relating to spirits and tobacco, furnishes a striking instance of this. After providing for a large number of specific forfeitures, or forfeitures for specific breaches of the law, it follows up the subject by sections of the most general nature, so framed as not to admit of any possible escape or evasion, and which necessarily include most of the cases before specifically provided for. Statutes in *pari materia*, like the acts of 1864 and 1866, are to be construed together, and repeals by implication are not favored if the acts can reasonably stand together" (pp. 364, 365).

Wood *vs.* United States, 16 Pet., 363:

A libel in the District Court of Maryland of twenty pieces of cloth imported and alleged to be forfeited.

"The libel contained a number of counts; but that alone which is necessary to be here stated, is the count founded upon the sixty-sixth section of the Revenue Collection Act of 1799, c. 128, which declares, 'that

if any goods, wares, or merchandise, of which entry shall have been made in the office of a collector, shall not be invoiced according to the actual cost thereof at the place of exportation, with design to evade the duties thereupon, or any part thereof, all such goods, wares, and merchandise, or the value thereof, to be recovered of the person making the entry, shall be forfeited.' The count stated that the goods in controversy were not invoiced according to the actual cost thereof at the place of exportation, with design to evade the duties" (p. 337).

"The question then arises, whether the 66th section of the act of 1799, c. 128, has been repealed, or whether it remains in full force. That it has not been expressly, or by direct terms repealed, is admitted; and the question resolves itself into the more narrow inquiry, whether it has been repealed by necessary implication.

"We say by necessary implication; for it is not sufficient to (363) establish that subsequent laws cover some, or even all of the cases provided for by it; for they may be merely affirmative, or cumulative, or auxiliary. But there must be a positive repugnancy between the provisions of the new law and those of the old; and even then the old law is repealed by implication only *pro tanto,* to the extent of the repugnancy" (pp. 341, 342).

"In truth, however, there is not the slightest repugnancy between these sections of the act of 1830 and 1832, and the 66th section of the act of 1799. The former apply only to cases where there has been an opening and examination of the packages imported, before they have passed from the custody of the custom-house; and in the course of such ex-

amination, the fraudulent intent in the making up of the package or invoice, has been detected; and thereupon it declares the same to be forfeited. Now, the 66th section of the act of 1799 may cover the same cases, but the forfeiture is the same, and, therefore, the provisions in such a case may well be deemed merely cumulative, and auxiliary to each other. But the 66th section is not confined to such cases. On the contrary, it covers all cases where the goods have been entered, and have passed from the custom-house without any examination or detection of the false invoices. It is therefore, much more broad in its reach. To enforce a forfeiture under the sections of the acts of 1830 and 1832, it would be necessary to allege, in the information or libel, all the special circumstances of the examination and detection of the fraud, under the authority of the collector; for they constitute a part of the *res gestæ*, to which the forfeiture is attached. But, under the 66th section, no such allegations would be necessary or proper, as the forfeiture immediately attaches to every entry of goods falsely and fraudulently invoiced, without any reference whatever to the mode or the circumstances under or by which it is ascertained.

"Besides, the 66th section not only provides for a forfeiture of the goods, but in the alternative, for a forfeiture of the value thereof, to be recovered of the person making the false entry. No such provision exists in the acts of 1830 or 1832. It is impossible, therefore, successfully to contend that the 66th section is repealed in toto, since no subsequent act covers all the cases provided for by it. It is, indeed, not a little singular that the argument, that it is repealed by implication, must found itself upon the

very ground that the present case is not covered by the other acts. It must in effect assert, that the repeal ought to be implied in all cases where the goods have passed from the custom-house without detection of fraud, simply because if they had been examined, and the fraud detected there, they might, in that case, and in that case only, have been subjected to forfeiture, which would at most only establish a repeal *pro tanto*. In our opinion, there is no just foundation for the argument, under any aspect. The provision in the 66th section is intended to suppress frauds upon the revenue. The other acts are designed to be auxiliary to the same important purpose; there is no repugnancy between the provisions; and to construe the latter as repealing the former, would be to construe provisions to aid in the detection of fraud, in such a manner as to promote fraud, by cutting down provisions of a far more general and important character, and essential to the security of the revenue. It seems to us that no court of justice is at liberty to adopt such a mode of interpretation of the revenue laws, unless driven to it by a stern and irresistible necessity" (pp. 343, 344).

Construing the word "through," found in the act of 1883, on which some argument was made in the court below, it may mean either *under* or *over* the street, the fee of the street being in the United States, which owns, as other property-owners, *usque ad coelum*. The road could not possibly go either over or under without the consent of Congress.

In the conveyance of a half interest in property, the grantor reserving the right to pass to an outer cellarway and *through*, includes the right of access to rooms in the house above the cellar. A passage through cannot mean a passage into or out only.

Choate *vs.* Burnham, 7 Pick., 274, 278.

For the reasons assigned, the judgment of the court below on the first count of the declaration should be reversed and its judgment under the second count thereof should be affirmed.

Respectfully submitted,

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